STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2005
v	No. 253115 Oakland Circuit Court
JAMES DURRELL JACKSON, Defendant-Appellant.	LC No. 03-189690-FC

Before: Owens, P.J., and Sawyer and White, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of one count of armed robbery, MCL 750.529, six counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b, and one count each of first-degree home invasion, MCL 750.110a, conspiracy to commit first-degree home invasion, MCL 750.157a, assault with intent to rob while armed, MCL 750.89, and assault with intent to do great bodily harm less than murder, MCL 750.84. The circuit court sentenced defendant to concurrent terms of thirty to fifty years' imprisonment for each of the armed robbery, CSC I and assault with intent to rob while armed convictions, twelve to twenty years' imprisonment for the conspiracy and home invasion convictions, and six to ten years' imprisonment for the assault with intent to do great bodily harm conviction. Defendant appeals as of right, and we affirm.

I

Defendant's convictions arise from a preplanned robbery of a home by defendant and three other accomplices. The robbers apparently believed that they would find marijuana inside the home, where the victims, a couple[1] and their two-year old son, were housesitting for friends. The robbery commenced when defendant and an accomplice with a shotgun, Quiller Anderson, kicked open the locked front door. Over the next two to three hours, defendant, Anderson, and two other accomplices, Timothy Ross and Reginald Lane, terrorized the victims by demanding to know where "the shit" was, extensively beating the husband, striking the wife several times, variously pointing their shotgun at and pressing it against the husband, wife and their son, forcing the wife to endure repeated sexual penetrations with the accomplices, sometimes with

[1] The victims married after the incident.

more than once accomplice simultaneously, and making the husband and wife perform sexual acts with each other in the presence of the accomplices and their highly distressed son. The robbers eventually departed with personal property of the victims, including a cellular phone, money and keys, and with some personal property of the home's usual residents.

II

Defendant first contends that his convictions of both the armed robbery and assault with intent to rob while armed (AWIRA) charges violate double jeopardy principles because they constitute multiple punishments for the same offense. We disagree.

Contrary to defendant's assertion, the armed robbery and AWIRA charges and convictions were not premised on the same actions. Further there were multiple victims. The testimony of the husband, wife, and codefendants Anderson and Ross[2] indicated that after Anderson kicked in the front door and he, defendant and Lane entered the house, Anderson pointed the shotgun at the husband and struck him with it; at the same time, defendant and Lane repeatedly struck the husband with their fists and kicked him; defendant and the other assailants demanded that the husband "give [them] the shit"; and the assailants took from the husband some money and his cell phone. This testimony supports the jury's conviction of defendant as an aider and abettor in the armed robbery of the husband. MCL 750.529; MCL 767.39; *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001); *People v Turner*, 213 Mich App 558, 568-569, 571-572; 540 NW2d 728 (1995).

With respect to the AWIRA charge, the wife testified that after defendant and Anderson beat her husband for a prolonged period while she was nearby, defendant ordered her into the first floor bedroom; she followed his instruction because she feared for her life; Anderson accompanied her husband and son into the bedroom; defendant and Anderson "kept asking [the wife and the husband] where the shit was"; defendant, Anderson and a third assailant continued to beat the husband, while at the same time "[p]ulling out dresser drawers, searching through them, going through everything in the closet, pulling video tapes out from underneath the T.V."; defendant instructed Anderson to "shoot that bitch because she's seen my face"; shortly thereafter, Anderson approached her, "pointed the gun to [her] head and then to [her] son's head and asked if [they] wanted to die"; after which she began to cry because she believed she would die. This testimony amply establishes defendant's guilt, as an aider and abettor, of assaulting the wife with the intent to commit a robbery while armed with a dangerous weapon. *Mass*, *supra*; *People v Johnson*, 130 Mich App 26, 28 n 1; 343 NW2d 226 (1983).

"Because double jeopardy does not apply to crimes committed against different victims, even if the crimes occurred during the same criminal transaction, defendant's convictions of [armed robbery] and assault with intent to rob while armed did not violate double jeopardy principles." *People v Hall*, 249 Mich App 262, 273; 643 NW2d 253, remanded on other grounds 467 Mich 888 (2002).

[2] The codefendants pleaded guilty to various charges before the time of defendant's trial, at which Anderson and Ross testified.

III

Defendant next maintains that the circuit court exceeded the minimum sentencing guidelines range for the CSC I convictions on the basis of the impermissible consideration that he exercised his Sixth Amendment right to a jury trial.

It is well-established that when tailoring and imposing a convicted defendant's sentence, the sentencing court may not take into account "factors that violate a defendant's constitutional rights," *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998), including the defendant's exercise of his right to have a trial by jury. *People v Snow*, 386 Mich 586, 592-594; 194 NW2d 314 (1972). Just before imposing sentence in this case, the circuit court commented critically concerning defendant's decision not to plead guilty and opt for a trial:

> I was astonished when I saw the presentencing report in this case for the particular reason that the other Defendants in this matter, at the very least allowed the victim in this matter, . . . the opportunity to try and get on with her life and not put her through another trial, not put her through having to testify as to exactly what was done to her and those sentences were within the top end of the guidelines.
>
> I was disappointed, aggravated, and dismayed that the Probation Department thinks that in this case that this Defendant, considering the testimony that I heard and that was presented, feels he somehow should have the same sentence as the other individuals who were able to step up to the plate and say what they did and to admit their guilt.
>
> I have no problem that [the victim] doesn't want to speak today. I can't imagine she should have to say it a fourth time. She was eloquent, she was honest, and she is a victim and she'll be a victim the rest of her life and this Defendant made her go through it again.

Although the court's statements appear to impermissibly punish defendant for exercising his right to trial, in reviewing the court's statements in their entirety, we conclude that these impermissible considerations did not affect the court's imposition of sentence for the CSC I convictions.

A trial court must impose a minimum sentence within the statutory guidelines range unless the court "has a substantial and compelling reason for th[e] departure and states on the record the reasons for departure." MCL 764.34(3). Michigan courts have defined the legal term of art "substantial and compelling reason" as a reason that (1) is objective and verifiable, (2) keenly or irresistibly draws the attention of a court, and (3) has "'considerable worth' in deciding the length of a sentence." *People v Babcock*, 469 Mich 247, 257-258, 272; 666 NW2d 231 (2003), quoting *People v Fields*, 448 Mich 58, 62, 67; 528 NW2d 176 (1995). The trial court cannot premise a departure from the guidelines "on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

This Court reviews for clear error a trial court's finding concerning the existence or nonexistence of a particular sentencing factor, but considers de novo the legal determination whether a particular factor qualifies as objective and verifiable. *Babcock*, *supra* at 264-265, 273. This Court reviews for an abuse of discretion a trial court's determination that an objective and verifiable factor constitutes a substantial and compelling reason justifying departure from the statutory minimum sentence range. *Id.* at 264-265, 274. If the trial court articulates several reasons for a departure, and this Court "determines that some of these reasons are substantial and compelling and others are not, the panel must determine whether the trial court would have departed, and would have departed to the same degree, on the basis of the substantial and compelling reasons alone." *Id.* at 260, 273.

On the basis of guidelines scoring, the sentencing information report recommended that the circuit court impose a minimum term of imprisonment between 171 and 285 months. Immediately after making the above-quoted remarks concerning defendant's choice to stand trial, the circuit court explained that "[b]ased on the testimony that this Court listened to and was able to observe, the credibility of the witnesses, and respecting the decision of the jury, [it] does find that an upward guideline departure is justifiable considering the excessive brutality, violence, the terrorism that had occurred to both these victims . . . ." The court exceeded the guidelines, imposing a thirty-year minimum sentence for the CSC I convictions.

Defendant asserts that the court improperly relied on the excessive violence and terrorism factors because the guidelines as scored already took them into account. Defendant received a high offense variable total of 200 points premised on (1) several actions that he and his accomplices directed toward *a* victim (pointing a firearm, inflicting bodily injury and serious psychological injury requiring medical treatment, acts of sadism, torture or excessive brutality, asportation to a place of greater danger, exploitation of a difference in size or strength, more than two sexual penetrations, and committing "a pattern of felonious criminal activity involving 3 or more crimes against a person"), MCL 777.31-777.34, MCL 777.37-777.41, MCL 777.43, as well as (2) the fact that two or more victims were "placed in danger of injury or loss of life," MCL 777.39(1)(c), (2)(a), for which the court scored ten points. Despite the high offense variable score, we find that it did not take into account the extent of the extraordinary victimization that defendant and his accomplices inflicted on the multiple victims present during the crimes.

The exceptional facts of this case, to which the circuit court referred before departing from the guidelines, support the court's finding that "excessive brutality, violence, [and] the terrorism that had occurred to both these victims" warranted an upward departure from the minimum guidelines range applicable to the CSC I convictions. *Babcock*, *supra* at 264-265, 273. The guidelines as scored simply do not contemplate the following objective and verifiable acts illustrating that each of the multiple victims in this case experienced sadism, torture or excessive brutality: (1) in the presence of the wife and the two-year old son, the husband endured a severe beating for a prolonged period, at least one-half hour with occasional beating thereafter, that split open the skin on his skull and caused multiple bruises and lacerations all over his body; the husband felt countless strikes by a shotgun, fists, feet and a whipping by an extension cord, and the wife saw the husband struck fifty or sixty times; (2) the assailants forced the husband to strip off his clothing by "point[ing] the gun to [the wife's] head and then to [the] son's head and ask[ing] if [they] wanted to die"; (3) while Anderson held the shotgun to the wife's face, he and defendant forced her to remove her clothing; defendant and the other assailants issued repeated

threats, including that Anderson should shoot the victim because she had seen his face, and that they "should shoot [the wife] for bleeding, bitch"; they also advised the husband, "[B]itch, give us the shit or we're going to rape your girl"; (4) on one occasion, defendant committed three acts of vaginal and rectal penetration of the wife while she was forced to perform fellatio on Anderson, before the two other assailants also forced the wife to fellate them; during one of the last two acts of fellatio, someone penetrated the wife's vagina from behind; the husband repeatedly was beaten and forced to watch many of the penetrations of the wife; (5) defendant and the other assailants forced the wife to fellate the husband briefly before punching and hitting the wife, and making her get on top of her husband and make sexual contact for a short time, all of which occurred while the two-year old son cried and screamed in the wife's arms; (6) the assailants repeatedly separated the victims, especially the wife, who was taken from place to place to facilitate multiple acts of sexual penetration with the various assailants; and (7) after the crimes, which occurred over the course of between two to three hours, (a) police officers indicated that the wife appeared hysterical and devastated; the wife subsequently lost her job and developed an ongoing anxiety disorder that requires daily medication, (b) a police officer reported that the husband exhibited "extremely upset, hysterical" behaviors, and (c) the mother observed that the son repeatedly exhibited aggressive behaviors. These objective and verifiable facts also keenly and irresistibly strike us as worthy of consideration in the crafting of defendant's sentence. *Id*. at 257-258, 272. Accordingly, we cannot conclude that the circuit court abused its discretion by finding that these several substantial and compelling reasons justified its departure from the guidelines range. *Id*. at 264-265, 274.

Although the circuit court mentioned defendant's decision to opt for a jury trial before imposing sentence, the court specifically cited only the excessive brutality and terrorization of multiple victims as the justification for its upward departure, both at the sentencing hearing and on the judgment of sentence. Even assuming that the circuit court gave defendant's exercise of his constitutional rights some consideration in imposing sentence, we conclude that in light of the many other substantial and compelling factors detailed above, "the [circuit] court would have departed, and would have departed to the same degree," by imposing the thirty-year minimum sentence for the CSC I convictions. *Babcock*, *supra* at 260, 273. Consequently, we detect no plain constitutional error that affected the circuit court's imposition of sentence.[3]

III

Defendant lastly argues that the circuit court departed from the sentencing guidelines on the basis of "facts not found by the jury," in violation of *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We need not address this issue beyond observing that although in separate opinions, a majority of the Michigan Supreme Court has found that the United States Supreme Court's ruling in *Blakely* has no application to a trial court's determination of the proper minimum portion of an indeterminate sentence. *People v Claypool*, 470 Mich 715, 730-731 n 14 (opinion by Taylor, J.), 738-740 (opinion by Corrigan, C.J., concurring in part and dissenting in part), 741 (opinion by Cavanagh, J., concurring in part and

[3] Because the circuit court imposed a valid sentence, we need not consider defendant's request for resentencing before a different judge.

dissenting in part), 744 (opinion by Weaver, J., dissenting in part and concurring in part), 744 n 1 (opinion by Young, J., concurring in part and dissenting in part); 684 NW2d 278 (2004).

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Helene N. White